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No. 89-1786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TIMOTHY E. RUSSELL,

Petitioner,

vs.

LEONARD G. DUNSTON, Individually and as Director of the New York State Division for Youth; ROBERT A. WILEY, Individually and as Director of Harlem Valley Secure Center; and EDWARD V. REGAN, Individually and as Comptroller of the New York State Employees' Retirement System,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

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Petitioner, a former probationary employee with the New York State Division For Youth, was terminated from employment in accordance with N.Y. Civil Service Law ("CSL") § 71 (McKinney 1987) while on unpaid medical leave status. He seeks review of an opinion and judgment of the United States Court of Appeals for the Second Circuit which held that respondents' rejection of his untimely application for disability retirement benefits did not violate his rights under the due process clause of the fourteenth amendment. The petition for certiorari should be denied.

As petitioner acknowledges, he "fell into a rare situation." (p. 18)* He makes no showing that a ruling by this Court would have any impact on any other state's statutory scheme, much less that the courts of appeals are divided on the issue presented. Moreover, "[t]he gap into which petitioner fell" has been closed in New York due to the amendment to Retirement and Social Security Law § 605(b)(2) and 4 N.Y.C.R.R. §§ 5.9, 21.8 (p. 18 n.3) in 1989. These amendments enacted subsequent to Mr. Russell's termination require that occupationally injured civil servants be given thirty days' notice of the termination of their medical leave. Therefore, it is a virtual certainty that Mr. Russell's "rare" and "unusual" situation will never occur again.

Furthermore, as the Court of Appeals held, the State was under no constitutional obligation to provide petitioner with pre-termination notice. As the court concluded, Russell had ample time and notice to apply for benefits if he believed himself permanently disabled. (A-13) The court's holding flowed from its straightforward application of this Court's well-established test adopted in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Therefore, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 16, 1990

Respectfully submitted,

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* References preceded by "p." are to the petition for certiorari. The reference preceded by "A." is to the appendix to the petition.